# No. 22,630

IN THE

# United States Court of Appeals

## For the Ninth Circuit

JONES STEVEDORING COMPANY, a corporation,
*Appellant,*

vs.

NIPPO KISEN COMPANY, LTD., a corporation,
*Appellee.*

NIPPO KISEN COMPANY, LTD., a corporation,
*Appellant,*

vs.

STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC., a corporation,
*Appellee.*

**Appeal from the United States District Court for the Northern District of California**

## APPELLEE'S BRIEF

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## Subject Index



## Table of Authorities Cited

### Cases

## Statutes



## Rules

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## APPELLEE'S BRIEF

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### JURISDICTION

Jurisdiction of this Court exists, under 28 U.S.C. § 1291, by virtue of a Notice of Appeal filed November 21, 1967 (R. 142)[1] from a Judgment (R. 140) entered in the United

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[1]Since the record on appeal comprises a volume of the Clerk's Record and two volumes of the Reporter's Transcript with separate pagination not continuous with the Clerk's Record, we have designated references with "R" for the Clerk's Record and "Tr." for the Reporter's Transcript.

States District Court for the Northern District of California on October 30, 1967.

The District Court had jurisdiction, under 28 U.S.C. § 1333, by virtue of a Complaint (R. 1) for damages and other relief brought against Appellee shipowner herein by an injured longshoreman (Mastro) under the general maritime law and an impleading petition (R. 15) seeking indemnity from Appellant Jones Stevedoring Company (hereafter referred to as stevedore) under the general maritime law.

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## STATEMENT OF THE ISSUES

The principal issue presented is whether the District Court's finding that the injured longshoreman, Mastro, was an employee of Appellant Jones Stevedoring Co., rather than Appellee Stockton Bulk Terminal Company of California, Inc., should be overturned, when based on what we submit is substantial and convincing evidence in the District Court.

An additional issue is presented by the stevedore's contention, presented for the first time in this Court, that the District Court was in error in awarding interest on the shipowner's damages from the time such sums were paid out by the shipowner.

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## STATEMENT OF THE CASE

The longshoreman, Joseph F. Mastro, commenced an action against the shipowner by filing a complaint (R. 1) with the usual counts charging negligence and unseaworthiness of the shipowner's vessel, HOKYO MARU, seeking damages for personal injuries.

After trial, with all the parties to this appeal before the Court, the Court found in favor of the shipowner and against longshoreman Mastro, reserving adjudication of the indemnity issue for a later date. The basis of the Court's decision in favor of the shipowner was its finding that "The sole proximate cause of any injuries libelant sustained . . . was . . . his own negligent conduct . . ." (Finding No. 17, R. 113, Appendix "A", *infra.*)[2]

This left to be decided only the question which of the two parties, Jones Stevedoring or Stockton Bulk Terminal was the employer of Mastro, to whom his negligence was to be imputed so as to render it liable to pay the damages of the shipowner, comprising its fees and expenses of defense, and the further question of the amount of such damages.

After hearing further evidence, at a later date, dealing exclusively with the indemnity issue, the Court found:

> "1. Plaintiff, Joseph A. Mastro, was at all material times, employed as a longshoreman by Jones Stevedoring Co., and not Stockton Bulk Terminal Company of California, Inc." (Supplementary Finding 1, R. 139, Appendix "A" *infra.*)

The Court accordingly entered the judgment against the stevedore which is the subject of this appeal.

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## SUMMARY OF ARGUMENT

The findings in this case, as in other Civil cases, are subject to the "clearly erroneous" rule and therefore are

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[2]The complete Findings of Fact and Conclusions of Law are printed in Appendix "A" to the Brief.

to be affirmed unless the evidence leads to a definite and firm conviction that error has been committed. The evidence in this case does not support—much less compel—the result called for by the stevedore and fully supports the District Court's findings that Jones, as stevedore, employed Mastro. The fault of Mastro was a breach of duty by his stevedore employer, Jones, pursuant to the familiar doctrine of *respondeat superior*.

It should be noted that the interest award of which Jones complains does not run from the entry of judgment against Mastro. Rather, it runs from the date of actual payment by the shipowner. The indemnity case was brought to trial on May 8, 1967, approximately one year after payment, and final judgment was entered on October 30, 1967. (Docket sheet, R. 156.) As the stevedore had the use of the shipowner's money for the period in question no error was committed in the interest award.

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## ARGUMENT

### I. THE FINDINGS ARE TO BE UPHELD UNLESS CLEARLY ERRONEOUS AND ARE IN FACT FULLY SUPPORTED BY THE EVIDENCE.

#### A. The standard of review here is the "clearly erroneous" rule.

This is an appeal attacking the District Court's findings of fact. The standard of review of findings of fact is established by Rule 52, F.R.C.P., which provides, in part, as follows:

> "Rule 52. Findings by the Court
>
> (a) Effect. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be

> given to the opportunity of the trial court to judge of the credibility of the witnesses . . . ."

Thus findings made pursuant to Rule 52 are entitled to great weight on appeal. In *United States v. Oregon State Medical Soc.,* 343 U.S. 326, 339 (1952), the Supreme Court said:

> "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . . How can we say the judge is wrong? We never saw the witnesses . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd v. Boyd,* 252 NY 422, 429, 169 NE 632, 634."

More recently, this Court has held, in *Neulsen v. Sorensen,* 293 F.2d 454, 460 (9th Cir. 1961), that "in so evaluating the evidence the trial court's appraisal of the credibility of the witnesses is to be accepted, no challenge to such appraisal being permissible in the appellate court."

Thus, the trial Court's finding[3] of fact that Mastro was an employee of Jones Stevedoring is to be upheld unless

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[3]Appellant appears to contend that employment here is a conclusion of law rather than a factual issue. In this Appellant confuses legal definitions of employment with the determination whether employment exists, under those definitions, in a particular case. Surely it cannot be contended that, if this were a jury case, the issue of employment should have, or much less would have, been taken from a jury by the Court below and decided by the Court.

Appellant can show that the evidence so firmly established Mastro to be an employee of the terminal that it was clearly erroneous to have found otherwise.

There is no support for the stevedore's assertion that the clearly erroneous rule does not apply to the situation in the present case and the stevedore's statement that the facts were uncontradicted and that credibility was not in issue is incorrect, as we will show.

**B. The findings and decree in this case are fully supported by the evidence.**

The stevedore would have this Court try the issue of longshoreman Mastro's employment *de novo* on evidence supposedly clear and uncontradicted. Testimony surrounding Mastro's employment was contradicted on the record and credibility was very much in issue. Indeed it was the commendable candor of Mastro himself which played a part in judgment against him. Mastro also testified that Jones was his employer. The evasiveness of the stevedore's office manager at the time in question, Rudolph J. Danska, received the careful attention of the Court when the Court closely examined the witness on this crucial issue. (Tr. 216 to 219.) The same witness stood impeached by his deposition wherein he testified that Jones supplied, or at least obtained, among others, the gang boss (Mastro). (Tr. 228, 229.)

The payroll agent concept asserted by the stevedore on page 30 of its brief requires some amplification. Mastro acknowledged on cross-examination that the only reason he considered Jones his employer was because they were handling the payroll. (Tr. 93.) As Mastro went on to

testify under examination by stevedore's counsel, Mr. Klein (Tr. 95):

> "Q. At any rate, so far as you know, Jones handled the payroll?
>
> A. I got my money from Jones Stevedoring Company."

It appears that the employment issue is receiving different treatment from stevedore's counsel in this Court. The colloquy below is revealing:

> "Mr. Partridge: And a claim was duly filed and processed under that workmen's compensation policy in this particular case, was it not?
>
> Mr. Klein: I will make the same objection to this, your Honor. I think the entire question of insurance is irrelevant to the liability as to the ship in this indemnity case.
>
> The Court: We are not talking about the fact of insurance. We are talking about the fact that the company at least regarded the injured stevedore as falling within the covering language of the policy, and to the extent that is consistent with the idea that he was an employee of Jones Stevedoring Company, it has some probative value.
>
> Mr. Klein: I think in line with my prior opening statement, argument, that the issues here are not those of employee/employer relationship, but those of indemnity based upon things that I have mentioned before which I think are the holding out of any company——
>
> The Court: Well, your direct examination was conducted on the theory that the relationship between the stevedoring gang and Jones Stevedoring Company was so tenuous as to preclude any assumption that they were even in the loose maritime sense em-

ployees of Jones Stevedoring Company. Ordinarily you don't make a claim for workmen's compensation benefits on behalf of an employee if he isn't an employee. That is all." (Tr. 230, 231.) (See also Tr. 202, 209.)

The Court's remarks expressed an appreciation of the relevance of compensation under the *Longshoremen's and Harbor Workers' Compensation Act,* 33 U.S.C. 901 *et seq.* and for whose account it was paid and its relationship to employment and, therefore, the indemnity issue. While the evidence with respect to insurance was ultimately stricken on motion of stevedore's counsel (Tr. 248, 249), the accident report form (BEC 202) required pursuant to the *Longshoremen's & Harbor Workers' Compensation Act,* 33 U.S.C. § 930, that was filed on behalf of Jones as an employer, was in evidence before the Court here. (Defendant's Exhibit "D".) It shows Jones Stevedoring Co. as the employer. Title 33 U.S.C. 902 defines employer for the purposes of compensation.

Surely there is no challenge in this Court to the fact that the compensation benefits were paid to Mastro by Jones as a stevedore employer.

Also before the trial Court was the deposition of A. W. Gatov placed in evidence by Stockton Bulk. (Tr. 246.) He was an officer of Stockton Bulk Terminal at all material times and testified:

"Q. Can you outline briefly what the setup was of Stockton Bulk on January 9th, 1962?

A. In what respect?

Q. How was it operating if it had no employees other than the corporate officers?

A. The only employees that the Stockton Bulk Terminal Company ever had were the administrative managerial employees.

Q. All right. Who were they?

A. I can't give you the names of all the individuals. We had—There was myself as President.

Q. Yes.

A. There was a secretary-treasurer. There was a general manager and assistant general manager, a couple of superintendents. I don't recall their names. But the framework was that of an administrative managerial framework. We don't hire others.

Q. In other words, just generally speaking, in addition to the corporate officers, the company operated with a managerial setup?

A. Yes.

Q. You had no manual labor employees as far as you know?

A. No.

Q. What type of work did Stockton Bulk do on January 9th, 1962 and in that general period of time?

A. Well, the only function of the Stockton Bulk Terminal Company was to unload rail cars of bulk mineral materials to stockpile them and to subsequently load that material to ships.

Q. In that connection who did the actual hand labor work? People in your employ?

A. No.

Q. In whose employ were they?

A. We used Jones Stevedoring Company as labor contractors. They hired the men.

Q. And Jones handled all the payroll?

A. That is correct.

Q. Who furnished the supervision of these men?

A. Well, the immediate supervision was provided by a walking boss; that was part of the gang, part of the gang, provided by Jones." (Gatov Deposition, p. 5, line 25 to p. 7, line 9.)

R. J. Danska, an officer of Jones, testified at trial to facts that would support an argument that Jones was merely a payroll agent and was impeached from his deposition:

"Q. Now, under this oral agreement, what did you or what did Jones undertake to provide Stockton Bulk?

A. Well, mostly just the payroll service.

Q. Yes?

A. And probably the ordering of the men for them, but I am not even sure of that.

Q. You are not sure who was to order the men?

A. I am not sure who ordered the men.

* * *

'Q. Now, as far as the supplying of men and labor, it was your understanding that Jones had supplied the walking boss and/or supplied—well, at least obtained the walking boss and its gang because if they did that, et cetera?

A. Yes.'" (Tr. 228, line 26, Tr. 229, line 14.)

The position of Jones as stevedore here in its attempt to avoid the effect of having made compensation payment benefits pursuant to the *Longshoremen's and Harbor Workers' Compensation Act,* 33 U.S.C. 904, in an indemnity case is not new. In *LaBolle v. Nitto Line, Nitto Shosen Kisen Kaisha v. Jones Stevedoring Company,* 268 F.Supp. 16, 1967 A.M.C. 1778 (N.D. Cal. 1967) the argument was advanced by Jones that the injured longshoreman was acting outside the scope of his employment

at the time of his injury. In the Memorandum Opinion which granted indemnity, Chief Judge Harris noted:

> "Further, the company paid full compensation to LaBolle because of the injuries sustained, liability for which is incurred only where an employee is injured in the course and scope of his employment." (268 F.Supp at 18; 1967 A.M.C. at 1780.)

On this record it was surely proper for the trial Court to find that Mastro was the employee of Jones rather than of Stockton Bulk Terminal.

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## II. THE INTEREST AWARD IS ENTIRELY PROPER.

Finally, the stevedore for the first time raises on appeal the question of interest.[4] The issue is therefore not properly raised before this Court.[5] No matter what court the stevedore chooses in which to raise this point it is without merit.

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[4]The stevedore admitted that interest is due by its statement in its Objections to Findings of Fact and Conclusions of Law and Proposed Modifications and Additions (R. 132) where it raised only the point regarding the sufficiency of proof that attorneys' fees and expenses in connection with defense of the main case had been paid, asserting: "If the shipowners have not paid this amount . . . (legal fees and costs of defense) they are not entitled to receive interest thereon." No exception or objection was made at any stage with regard to "delay" and the award of interest until the case reached this level.

[5]In *American Home Fire Assurance Company v. Hargrove,* 109 F.2d 86, 87 (10 Cir. 1940), the Court said:

> "The contention presented on the cross-appeal is that plaintiff is entitled to interest on the amount of the judgment from February 7, 1938, the date on which he contends that the company denied liability, rather than from the date of the judgment. It is unnecessary to explore the question as the record fails to indicate even remotely that it was presented to

The leading case in this Circuit on the question of interest appears to be *PRESIDENT MADISON,* 91 F.2d 835, 847, 1937 A.M.C. 1375, 1395 (9 Cir. 1937). Though this Court was dealing with the question of interest in connection with vessel collision, it enunciated the policy that interest is necessary to make "just compensation". Holding that the granting of interest is discretionary, the Court said:

> ". . . but the discretion must be exercised with a view to the right to interest unless the circumstances are exceptional".

The Court went on to point out that:

> ". . . this Court is in accord with the holdings in the First, Second, Fifth and Sixth Circuits and District Courts in the Third and Fourth. These are maritime circuits in which nearly all the admiralty cases are litigated." (Citing many cases.)

As was said in *American Smelting and Refining Co. v. Black Diamond Steamship Corp.,* 188 F.Supp. 790, 792, 1960 A.M.C. 2388, 2389 (S.D. N.Y. 1960):

> "It is true that the allowance of interest in admiralty suits rests within the discretion of the court. But the purpose of damages to make whole the injured party may be effectively served only if interest is awarded. It follows, therefore, that discretion may be utilized to disallow interest only in the face of 'exceptional

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the trial court in any manner or at any juncture. It is raised initially on appeal. That cannot be done."

In accord: *Adams v. U.S.,* 318 F.2d 861, 865 (9 Cir. 1963); *Pacific Contact Laboratories v. Solex Laboratories,* 209 F.2d 529, 533 (9 Cir. 1953); *Century Furniture v. Bernhard's, Inc.,* 82 F.2d 706, 707 (9 Cir. 1936); *O'Connor v. Ludlam,* 92 F.2d 50, 54 (2 Cir. 1937).

> circumstances.' *O'Donnell Transportation Co. v. City of New York* (2 Cir.), 1954 A.M.C. 1512, 215 F.2d 92, 95; *Wright* (2 Cir.), 1940 A.M.C. 735, 109 F.2d 699; see *U. S. Willow Furniture Co. v. La Compagne Generale Transatlantique* (2 Cir.), 271 Fed. 184, 186."

A review of the cases in which delay was sufficient to deny interest appears in order.

The stevedore's brief, at page 33, cites *THE SALUTATION,* 37 F.2d 337 (2 Cir. 1930). In that case the final decree was not entered for more than eight and one-half years after filing of the libel and only after a Motion was conditionally granted to dismiss the case for lack of prosecution was the case brought to trial. *THE STJERNEBORG,* 106 F.2d 896, 898 (9 Cir. 1939) (stevedores' brief, page 33), stands only for the proposition that "the allowance of interest is discretionary".

In *THE SCULLY,* 24 F.2d 846 (S.D. N.Y. 1928) the Court again dealt with a collision situation in which the general rule allows interest from the date of the collision. In that situation, however, the collision occurred in 1918 and the report of the Commissioner was not issued until 1927, nine years following the collision. The Commissioner's report was delayed for four years following the closing of case testimony and in that case the Court found an abuse of discretion in awarding interest.

In *P. R. Co. v. Downes Towing Corporation,* 11 F.2d 466 (2 Cir. 1926), five years elapsed between the reference to a Commissioner and his report. In holding that the allowance of interest from the date of the collision was an abuse of discretion, the Court nevertheless granted interest for a period of two years.

The stevedore relies heavily on *THE SALUTATION, supra.* The Court in that case stated it was an abuse of discretion to allow interest in the face of an *unexplained* delay. The cases reviewed above indicate that the first question is whether there has been a delay. None of the cases cited by Appellant nor those reviewed above dealt with the interest time period of approximately one year which is involved in this matter. In fact the cases reviewed above, as well as the ones cited by stevedore involve delays of four, five and eight and one-half years.

If the Court determines that delay is involved it must further determine if the delay was "unexplained". At the beginning of the indemnity trial the Court requested review of the background of the case because the original action previously tried to the same Court had been disposed of nearly two years before. (Tr. 171, lines 7-10.) The opening remarks by counsel for shipowner are directed specifically to the question of whether or not there was an unexplained delay. (Tr. 173, line 10 to 174, line 6.) At the time the main case was tried the question of contributory negligence of the longshoreman as a basis for indemnity was pending before this Court of Appeals and there were conflicts in other circuits as to whether contributory negligence of a longshoreman employee requires an indemnity award.

It had been determined in the trial of the main case that the cause of Mastro's injury was his own negligence. (R. 182.) The pending case referred to by shipowner's counsel is *Arista Cia. De Vapores S.A. v. Howard Terminal,* 372 F.2d 152, 1967 A.M.C. 312 (9 Cir. 1967), which

was decided on February 9, 1967. The final evidentiary phase of this trial commenced on May 8, 1967. *Arista* held that the contributory negligence of the longshoreman was a breach of his employer's warranty to the vessel, the specific point involved in this case.

No point would have been served to try the indemnity involved in the present case based on Mastro's contributory negligence until such time as the *Arista* decision was rendered. To have tried the present case before that decision would have been to force the trial Court to render a decision where the law involved was as yet unsettled and pending before this Court. A decision in this posture of a case could well have resulted in additional appeals and a much more lengthy process than the one actually involved.

It is therefore submitted that any delay in this case was not only explained to the satisfaction of the trial Court but represented the only prudent course for Court and counsel to follow in the interest of economy of time, effort and money to all concerned.

It must be clear that when the courts deny interest for all or part of the period when one party has had the use of another party's money they are imposing a penalty upon the second party for presumably serious procedural derelictions such as are in no way involved in this case.

## CONCLUSION

For the foregoing reasons it is submitted the judgment should be affirmed.

Dated, San Francisco, California,
November 4, 1968.

Respectfully submitted,
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**(Appendix "A" Follows)**

# Appendix "A"

## Appendix "A"

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The case as between Libelant and Respondent was duly tried and oral and documentary evidence received. The case was argued by counsel and submitted. The court having ordered a Decree for Respondent and against Libelant, and having further ordered that additional proceedings on the claim of Petitioner against Respondent-Impleaded be deferred, now makes the following Findings of Fact and Conclusions of Law as to Libelant and Respondent:

### FINDINGS OF FACT

1. Libelant was at all material times employed as a longshoreman by Respondent-Impleaded, Jones Stevedoring Co. and/or Stockton Bulk Terminal Co. of California Inc.

2. Respondent was at all material times the owner and operator of the MV HOKYO MARU which was engaged in the bulk iron ore trade.

3. On and prior to January 9th, 1962 the MV HOKYO MARU lay at berth port-side to at the port of Stockton, California, for the purpose of receiving a cargo of iron ore in bulk.

4. The usual and customary method of loading such a cargo at Stockton at the time in question, which was followed, in this case, consisted of the use of a shoreside conveyor apparatus which included a large heavy spout. A portion of the conveyor apparatus suspended the spout

over the vessel's hold and the spout was used to direct the iron ore to various positions in the hold from time to time. The spout was hinged at the point of attachment to the conveyor to permit the bottom to be pulled in any direction.

5. The movement of the conveyor itself was limited and therefore the ship's cargo falls were used to move or position the bottom of the spout from time to time to the desired position in the ship's hold away from the vertical. This was accomplished by leading the ship's cargo falls fair from the top of the ship's cargo booms down to either side of the hatch coaming at or near which point the fall passed through a snatch block and were attached to a short wire pendant, which in turn was attached near the bottom of the spout. By positioning the snatch blocks at various points forward and aft on the port or starboard side of the hatch coaming and by using the ship's winches as a source of power, the bottom of the spout could be moved away from the vertical as desired. The spout also had telescoping ability which is not material.

6. A snatch block differs from an ordinary ship's block only in that it can be opened from the side to insert a wire without the necessity of working with or to the end of the wire. In all other respects it is essentially the same as an ordinary ship's block. The throat of a block is that point near the top where wire or rope enters and leaves the block.

7. On or about January 9, 1962, Libelant was aboard the HOKYO MARU shortly before noon in the capacity of gang boss with his gang which was working at No. 2

hatch. No other shoreside workers possessing higher authority than Libelant as gang boss were present at No. 2 hatch at this time but at least two of Libelant's subordinates were present. The HOKYO MARU's Third Officer was also present observing the progress of cargo operations. Shortly before noon, the Third Officer asked that the iron ore cargo be distributed in another location in the ship's hold. The decision on how this should be accomplished rested entirely with Libelant.

8. Libelant, as gang boss, determined it would be necessary to move a snatch block on the starboard or offshore hatch coaming in order to place the spout in a new position. At this time, the starboard cargo fall ran fair from the top of the boom through the snatch block to a short pendant at the base of the spout and it held the bottom of the spout in an offshore direction away from the vertical. Because of the substantial weight of the spout, the starboard fall was taut.

9. Libelant approached the snatch block with the intention of moving it by himself although additional shoreside help, his subordinates, was available at the hatch and, subject to his orders, if he had elected to use it. Libelant, wearing gloves, approached the snatch block and grasped that portion of the starboard cargo fall which ran from the top of the starboard boom down to the snatch block. His right hand was a few feet away from the snatch block. He signalled the winch driver, his subordinate, for slack which was given. The substantial weight of the spout naturally caused it to seek its vertical position, which caused an abrupt movement of the cargo fall as it was slacked.

10. As the starboard cargo fall was being pulled slack by the substantial weight of the spout in seeking its vertical position but before the fall itself had gone slack, Libelant's right hand was suddenly drawn into the throat of the snatch block between the cargo fall and the sheave resulting in traumatic amputation of the outer portion of Libelant's second, third and fourth fingers and tissue and other injury to his first and fifth fingers.

11. All the HOKYO MARU's gear being in use at the time, as well as all appurtenances to the vessel embraced by the seaworthiness warranty conformed with the custom and usage of vessels in the same and similar trade.

12. Placing one's hands or either of them on a wire which is moving or about to be moved, such as the cargo fall in this case, in the proximity of a snatch block or other fairlead device, involves the foreseeable risk that the person so doing may have his hand caught between the sheave and the wire or fall at the throat of the block.

13. The cargo fall at No. 2 starboard hatch in use at the time in question was in all respects fit and proper, free of defects and customary for the trade.

14. While there was ore dust present on the deck near No. 2 hatch, which is customary in such a loading operation, Libelant has failed to prove such area was rendered dangerous or slippery because of the dust or any combination of the dust and moisture.

15. Libelant has failed to prove that the HOKYO MARU was at any time or in any respect not reasonably

fit for the service in which she was engaged and she was in all respects and at all material times fit for such service and seaworthy. Libelant has failed to prove and it is not true that Respondent or any Agent or employee of Respondent acted at any time otherwise than as a reasonable man of ordinary prudence in the circumstances. Libelant has failed to prove and it is not true that Respondent had or should have had notice of any improper condition aboard the HOKYO MARU and has failed to prove and it is not true that such condition existed.

16. Libelant has failed to prove the causal connection between any injuries sustained by him for which he complains and any negligence of Respondent or breach of Respondent's warranty of seaworthiness as vessel owner.

17. The sole proximate cause of any injuries Libelant sustained while on board the HOKYO MARU was the result of his own negligent conduct in placing his hand on a cable or cargo fall that was moving or about to move in the proximity of a snatch block or other obstruction.

## CONCLUSIONS OF LAW

1. The Respondent shipowner does not have the burden of an insurer and is not required to provide an accident-proof ship, and the mere occurrence of an accident aboard ship does not impose liability upon the shipowner.

2. Libelant has the burden of proving by a preponderance of the evidence that his claimed injury was

proximately caused by the negligence of Respondent or its breach of a warranty of seaworthiness.

3. Respondent was not negligent, did not breach any warranty of seaworthiness and was not otherwise at fault in the premises and any negligence which occurred was that of Libelant himself which was the sole proximate cause of his injury.

4. The parties are entitled to a Decree in favor of Respondent and against Libelant on the Libel reserving adjudication of Respondents' Impleading Petition to a later date.

## SUPPLEMENTARY FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court having heard further evidence in this case and having read the briefs and heard the argument of counsel and the matter having been submitted as between Third-party Plaintiff and Third-party Defendants, now makes supplementary findings of fact and conclusions of law as between these parties:

### FINDINGS OF FACT

1. Plaintiff, Joseph F. Mastro, was at all material times employed as a longshoreman by Jones Stevedoring Co., and not by Stockton Bulk Terminal Company of California, Inc.

2. Third-party Plaintiff has reasonably expended the sum of $7,132.90 for legal services and expenses in defending the claim of Plaintiff, Joseph F. Mastro.

## CONCLUSIONS OF LAW

1. Mastro's failure to exercise reasonable care and caution in the course and scope of his employment by Jones Stevedoring Co., constitutes a breach of Jones Stevedoring Co's., warranty to perform their work in a safe, proper and workmanlike manner.

2. Stockton Bulk Terminal Company of California, Inc., is entitled to a decree in its favor against Third-party Plaintiff.

3. Third-party Plaintiff is entitled to a decree in its favor against Third-party Defendant, Jones Stevedoring Co., in the amount of $7,132.90, with Court costs and interest from March 4, 1966.